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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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IN RE: FIRSTENERGY CORP) CIVIL ACTION NO.
SECURITIES LITIGATION) 2:20-cv-3785

)
)
THIS DOCUMENT RELATES TO:)
ALL ACTIONS)

Conference held before
Special Master Shawn Judge

Thursday, October 19th, 2023
11:07 a.m. EDT

Location: Remote via Zoom

Victoria S. Fricano, RPR

Job No. MW 6161935

1 APPEARANCES: (ALL VIA ZOOM)

2 On behalf of Class Plaintiffs:

3 RACHEL COCALIS, ESQ.

JASON A. FORGE, ESQ.

4 KEVIN S. SCIARANI, ESQ.

Robbins Geller Rudman & Dowd LLP

5 655 West Broadway

Suite 1900

6 San Diego, California 92101

619.231.1058

7 rcocalis@rgrdlaw.com

jforge@rgrdlaw.com

8 ksciarani@rgrdlaw.com

9
10 On behalf of Direct Action Plaintiffs:

JOHN T. NICOLAOU, ESQ.

11 Lieff Cabraser Heimann & Bernstein, LLP

250 Hudson Street

12 8th Floor

New York, New York 10013

13 212.355.9500

jnicolaou@lchb.com

14
15 On behalf of Defendant FirstEnergy Corp:

BETH D. NEWTON, ESQ.

16 Sullivan & Cromwell LLP

125 Broad Street

17 New York, New York 10004

212.558.4000

18 newtonb@sullcrom.com

19
20 On behalf of Defendant Donald R. Schneider:

BRIAN P. O'CONNOR, ESQ.

Santen & Hughes

21 600 Vine Street

Suite 700

22 Cincinnati, Ohio 45202

513.721.4450

23 bpo@santenhughes.com

1 APPEARANCES: (Continued)

2 On behalf of Defendant Charles E. Jones:

RACHAEL L. ISRAEL, ESQ.

3 DOUGLAS L. SHIVELY, ESQ.

Baker & Hostetler LLP

4 127 Public Square

Suite 2000

5 Cleveland, Ohio 44114

216.621.0200

6 risrael@bakerlaw.com

dshively@bakerlaw.com

7
8 On behalf of Defendant James E. Pearson:

TIMOTHY D. KATSIFF, ESQ.

9 BRITTANY M. WILSON, ESQ.

Ballard Spahr LLP

10 1735 Market Street

51st Floor

11 Philadelphia, Pennsylvania 19103

215.665.8500

12 katsiff@ballardspahr.com

wilsonbm@ballardspahr.com

13
14 On behalf of Defendant John Judge:

EMILY J. TAFT, ESQ.

15 Vorys, Sater, Seymour and Pease LLP

52 East Gay Street

16 Columbus, Ohio 43215

614.464.6400

17 ejtaft@vorys.com

and

18 VICTOR A. WALTON, JR., ESQ.

Vorys, Sater, Seymour and Pease LLP

19 301 East Fourth Street

Suite 3500

20 Cincinnati, Ohio 45202

513.723.4027

21 vawalton@vorys.com

1 APPEARANCES: (Continued)

2 On behalf of Defendants Jason J. Lisowski,
3 George M. Smart, Paul T. Addison, Michael J.
4 Anderson, Steven J. Demetriou, Julia L.
5 Johnson, Donald T. Misheff, Thomas N.
6 Mitchell, James F. O'Neil III, Christopher D.
7 Pappas, Sandra Pianalto, Luis A. Reyes, Jerry
8 Sue Thornton, Leslie M. Turner, Steven E.
9 Strah, and K. John Taylor:

10 JORDAN M. BAUMANN, ESQ.
11 MARJORIE P. DUFFY, ESQ.
12 Jones Day
13 325 John H. McConnell Boulevard
14 Suite 600
15 Columbus, Ohio 43215
16 614.281.3655
17 jbaumann@jonesday.com
18 mpduffy@jonesday.com

19 On behalf of Defendant Leila L. Vespoli:

20 AARON F. MINER, ESQ.
21 Arnold & Porter
22 250 West 55th Street
23 New York, New York 10019
24 212.836.7123
25 aaron.miner@arnoldporter.com

On behalf of Underwriter Defendants:

DAVID S. BLOOMFIELD, ESQ.
ROBERT W. TRAFFORD, ESQ.
Porter, Wright, Morris & Arthur, LLP
41 South High Street
Suite 2900
Columbus, Ohio 43215
614.227.2000
dbloomfield@porterwright.com
rtrafford@porterwright.com
and
JOSHUA N. SHINBROT, ESQ.
Davis Polk & Wardwell LLP
450 Lexington Avenue
11th Floor
New York, New York 10017
212.450.3976
joshua.shinbrot@davispolk.com

1 APPEARANCES: (Continued)

2 On behalf of Defendant Michael Dowling:

3 JOHN A. FAVRET, III, ESQ.

4 Tucker Ellis LLP

5 950 Main Avenue

6 Suite 1100

7 Cleveland, Ohio 44113

8 216.696.2678

9 john.favret@tuckerellis.com

10 On behalf of Energy Harbor:

11 JONATHAN R. STREETER, ESQ.

12 Dechert LLP

13 1095 Sixth Avenue

14 New York, New York, 10036

15 212.698.3826

16 jonathan.streeter@dechert.com

17 On behalf of Sam Randazzo and SFAO:

18 JEFFREY R. CORCORAN, ESQ.

19 Allen Stovall Neuman & Ashton LLP

20 10 West Broad Street

21 Suite 2400

22 Columbus, Ohio 43215

23 614.221.8500

24 corcoran@asnallaw.com

25 and

ROGER P. SUGARMAN, ESQ.

Kegler Brown Hill & Ritter

65 East State Street

Suite 1800

Columbus, Ohio 43215

614.462.5400

rsugarman@keglerbrown.com

1 P R O C E E D I N G S

2 MR. JUDGE: It is October 19th, 2023.

3 It's 11:07. We're on the record in the matter of
4 In Re: FirstEnergy Corp Securities Litigation,
5 Case Number 2:20-cv-3785.

6 We are here for purposes of oral
7 argument on two groupings of motion, the ECF
8 Number 491 involving nonparty Energy Harbor and
9 ECF Number 496 related to briefings regarding
10 nonparty Sam Randazzo.

11 We'll start with Number 491.

12 Counsel, if you would introduce
13 yourself, state your name and who you represent
14 for the client.

15 And after both sides have done that,
16 Movant, if you would proceed with argument.

17 MR. SCIARANI: Good morning, Mr. Judge.
18 My name is Kevin Sciarani. I'm counsel for
19 Class Plaintiffs, and I'll be handling the
20 plaintiffs' motion to compel Energy Harbor.

21 MR. STREETER: Good morning. My name is
22 Jonathan Streeter, and I'll be representing
23 Energy Harbor today in the argument.

24 MR. JUDGE: Thank you.

25 Counsel, whenever you're ready.

1 MR. SCIARANI: Special Master Judge, I
2 will try to keep my comments brief, but feel free
3 to ask for any clarification if anything needs to
4 be addressed in a little bit more detail.

5 The first request in Plaintiffs' motion
6 to compel is that Energy Harbor should produce
7 documents dated between July 21st, 2020, which is
8 the date Larry Householder was arrested for his
9 involvement in the HB6 fraud, through
10 December 31st, 2020, which is a day which the
11 parties have agreed with FirstEnergy should
12 encompass the vast majority of their discovery
13 obligations.

14 And so it's important to realize that
15 Energy Harbor was formerly known as FirstEnergy
16 Solutions. And during most of the class period,
17 it was a wholly-owned subsidiary of FirstEnergy
18 Corporation. And FES, or FirstEnergy Solutions,
19 was a direct participant in the HB6 fraud.

20 As a result, Energy Harbor is not a
21 run-of-the-mill third party in this case. And
22 you can see that in the deferred prosecution
23 agreement which was entered into by FirstEnergy
24 Corp with the DOJ.

25 In the DPA, which is short for the

1 deferred prosecution agreement, FirstEnergy
2 admitted that it conspired to commit honest
3 service fraud. And in part of that DPA included
4 working directly with FirstEnergy Solutions to
5 support Larry Householder through payments to
6 Generation Now. Generation Now was
7 Mr. Householder's 501(c)(4) which he used for his
8 benefit and his piggy bank to perpetrate the
9 fraud on the people of Ohio.

10 In exchange for this, FirstEnergy
11 expected that Larry Householder would take
12 specific action, including passing HB6 and
13 defending it from a repeal referendum.

14 FirstEnergy Solutions' name appears more
15 than 50 time in the DPA, and FirstEnergy
16 Solutions contributed over \$43 million of the
17 approximately \$60 million which is attributed to
18 FirstEnergy in the DPA.

19 FES's own lobbyist, Juan Cespedes, pled
20 guilty for his involvement in assisting
21 Mr. Householder and FirstEnergy Solutions with
22 the HB6 scandal. He testified at Larry
23 Householder's trial to his personal involvement,
24 orchestrating payments on behalf of FirstEnergy
25 Solutions for Larry Householder's benefit in

1 exchange for official action. And he
2 participated in managing FirstEnergy Solutions'
3 coordination with FirstEnergy and Larry
4 Householder's team during the time of the fraud.

5 FirstEnergy used FirstEnergy Solutions
6 as a bank to contribute approximately \$43 million
7 to Generation Now.

8 For example, on October 2018,
9 Mr. Cespedes, along with FirstEnergy Solutions'
10 chief of external affairs, Dave Griffing, and
11 others had a face-to-face meeting with Larry
12 Householder where they handed him a \$400,000
13 check made out to Generation Now. At the
14 meeting, Householder was supportive of FES's need
15 for a nuclear bailout, which would be found in
16 HB6.

17 In 2019, FES made over \$40 million in
18 payments to Generation Now to support the passage
19 of HB6 and defend it against a repeal referendum.

20 When FirstEnergy Solutions was not able
21 to pay any more money due to its bankruptcy
22 advisors cutting it off, it turned to FirstEnergy
23 Corporation to make 13-more-million dollars in
24 payments.

25 Dowling and Jones worked on the

1 sidelines along with FirstEnergy agents and
2 employees to help commit this fraud.

3 Those employees and agents include
4 Defendant John Judge, in this case, who was the
5 CEO or is the CEO of Energy Harbor and was the
6 CEO of FES at the time; Juan Cespedes, its
7 lobbyist; and Energy Harbor's current executive
8 chairman, John Kiani. They all authorized the
9 payments and held meetings with Larry Householder
10 or his team.

11 FirstEnergy Solutions was a key
12 beneficiary of the HB6 fraud, as the fraud was
13 intended to help resolve FES's nuclear problem.

14 FES owned two financially distressed
15 nuclear power plants, and the potential
16 decommissioning of those power plants could
17 subject FirstEnergy Corp, its parent company, to
18 contribute to the decommissioning costs.

19 FES's coordination with FirstEnergy Corp
20 was by design. Even though FES was purportedly
21 independent after it filed for bankruptcy in
22 2018, it was, as the bankruptcy court found,
23 utterly incapable of operating independently.
24 FirstEnergy provides services to FES through a
25 shared services agreement, including IT, external

1 affairs, certain legal services and things like
2 sending checks and sending wires.

3 In the bankruptcy settlement, which was
4 reached with FES's creditors, FirstEnergy agreed
5 to act as an agent of FES and cooperate in
6 lobbying matters.

7 So here we have FES and FirstEnergy
8 working together as part of this conspiracy to
9 bribe Mr. Householder in exchange for passing
10 HB6; however, although FirstEnergy has produced
11 about 21,000 documents dated on July 21st, 2020,
12 through December 31st, Energy Harbor's position
13 is that it should not have to produce any
14 documents. This is inconsistent with the
15 discovery in this matter, and that's inconsistent
16 with FirstEnergy Solutions' deep involvement in
17 the HB6 fraud.

18 It's clear that FirstEnergy Solutions or
19 Energy Harbor, as it is today, possesses relevant
20 documents. And by withholding documents on the
21 last day of the class period and the days
22 thereafter, we learned nothing of how Energy
23 Harbor reacted to the disclosure of Larry
24 Householder's arrest, any attempts it made at
25 creating public relations defensive maneuvers.

1 And, importantly, we don't see what happened to
2 Defendant John Judge in that time period.

3 Defendant Judge is a defendant in this
4 case, an individual defendant in this case, and
5 there's no basis for any differential treatment.

6 Furthermore, Energy Harbor engaged in a
7 parallel internal investigation into the matters
8 set forth relating to HB6 and Larry Householder.

9 The case law is consistent here. In
10 complex class actions and securities class
11 actions, courts consistently understand the
12 discovery falling into the class period is
13 appropriate to provide context to the facts that
14 happened within the class period.

15 And, indeed, in certain cases like the
16 BFI holdings case, courts have held that --
17 extended the discovery period to account for
18 internal investigations is appropriate.

19 And if -- there is no legal basis
20 identified by Energy Harbor, other than a
21 criminal matter which did not concern civil
22 discovery, as to why it should be relieved of its
23 duty to produce documents after the class period.

24 And, finally, Energy Harbor's position
25 is inconsistent with Judge Jolson's views

1 regarding Partners for Progress that are set
2 forth in her November 28th, 2022, and March 24th,
3 2023 orders.

4 So Partners for Progress was another
5 entity used by FirstEnergy to funnel money to
6 Larry Householder in support of his scheme. And
7 Judge Jolson rejected Partners for Progress's
8 burden arguments based on its involvement and
9 contribution with Generation Now.

10 Energy Harbor is no different. Its
11 contributions were greater than Partners for
12 Progress's to Generation Now. And Judge Jolson
13 did not relieve it from being forced to search
14 its outside counsel for relevant materials even
15 though there may be privileged documents within
16 that collection. Judge Jolson also denied
17 Partners for Progress's request for
18 cost-shifting. And those reasons apply equally
19 to Energy Harbor here.

20 In her March 24th, 2023 order, she cites
21 American Muni Power and Modern Plastics for the
22 factors to consider when thinking about ordering
23 cost-shifting.

24 Energy Harbor has claimed it has no
25 interest in this case. Plaintiffs find that hard

1 to believe. Although we understand that they are
2 not being sued for damages here, its defendant --
3 excuse me -- its current CEO is a defendant in
4 this case; and, obviously, his reputation turns
5 on whether or not he is found liable for
6 securities fraud.

7 Similarly, the company itself has been
8 implicated in this matter. And like I said
9 earlier, its name appears repeatedly throughout
10 the DPA.

11 In the case even cited by Energy Harbor,
12 Cornell v. Columbus, it notes that Rule 45 is not
13 intended as a mechanism for entities to evade
14 discovery and the costs that are associated
15 arising from their involvement in the underlying
16 acts. And that's true here.

17 The other factors considered by
18 Judge Jolson are the public interest, which this
19 case is of one of the utmost public interest
20 because it involved one of the greatest frauds
21 perpetrated on the people of Ohio. It was
22 described as the biggest public corruption
23 scandal in Ohio history. And FirstEnergy
24 identifies FES repeatedly in the DPA.

25 There is public interest in figuring out

1 who is responsible for enabling Larry
2 Householder, and that also turns on FirstEnergy
3 Solutions' involvement in this case.

4 And Energy Harbor can bear these costs
5 today. It's in the process of being acquired.
6 It's an ongoing concern. And it's important to
7 think about Rule 45's concern for significant
8 expense.

9 Here -- it's a relative term. And,
10 here, Energy Harbor found it was able to donate
11 \$43 million in exchange for a corporate bailout
12 while it was in bankruptcy. That bailout was in
13 the range of over a billion dollars, and
14 investors have lost billions of dollars in this
15 case.

16 And so in comparison to those factors,
17 any costs that Energy Harbor has, which are
18 generally unsupported at this time, do not render
19 those expenses significant.

20 So, in conclusion, there is no question
21 that FirstEnergy Solutions was intimately
22 involved in the HB6 fraud; and its documents
23 dated after July 21st, 2020, are clearly
24 relevant.

25 Given it's close relationship to

1 FirstEnergy Corporation, it should be ordered to
2 produce those documents using the search terms
3 which it has already used to produce other
4 documents in this case.

5 Mr. Judge, before I move on to the next
6 request in Plaintiffs' motion, do you have any
7 questions for me?

8 MR. JUDGE: I do not. Yes, if you would
9 address privilege, please.

10 MR. SCIARANI: Okay. So the second
11 request in Plaintiffs' motion is that Energy
12 Harbor should produce attorney-client
13 communications or documents that have been
14 withheld for attorney-client privilege regarding
15 501(c)(4) donations and drafts to the draft
16 language -- excuse me -- and edits to the draft
17 language of HB6.

18 Energy Harbor sought its attorney's
19 advice regarding 501(c)(4) to conceal its key
20 involvement in the HB6 scandal and also used its
21 lures to help it draft the language of HB6 so
22 that it could reap the rewards of its fraudulent
23 conduct; therefore, under the crime-fraud
24 exception to the privilege, those documents are
25 not privileged and should be produced.

1 The policy of the crime-fraud exception
2 is that people cannot use their lawyers in
3 furtherance of a crime of fraud. And there are
4 two prongs that need to be shown in order to
5 establish the crime-fraud privilege, and the
6 first is a prima facie showing of a sufficiently
7 serious crime of fraud.

8 In the Sixth Circuit, all a proponent
9 needs to show is that there's a reasonable basis
10 to suspect that a crime of fraud occurred, and
11 that's the standard set forth in the antitrust
12 grand jury case.

13 Just as kind of a contrast, allegations
14 that are completely unsupported by evidence are
15 not enough; however, the proponent does not need
16 to show enough evidence that would effect an
17 arrest or secure an indictment.

18 Here, that standard has been easily met.
19 As we discussed earlier, FirstEnergy, in its DPA,
20 admits that FES directly participated with
21 FirstEnergy Corporation in the fraud through
22 legal contributions, and FES also provided
23 on-the-ground support of the HB6 scheme. Some of
24 those documents have been attached to the motion,
25 and some of those documents were also used at

1 Mr. Householder's trial where he was convicted by
2 a jury for honest service fraud on the same
3 background of facts.

4 In addition, FirstEnergy Solutions' own
5 lobbyist, Juan Cespedes, pled guilty. In his
6 guilty plea, he admitted that he orchestrated
7 payments on behalf of FirstEnergy Solutions. And
8 so it is clear that there is a crime of fraud
9 related to FirstEnergy Solutions here.

10 The second prong is that the proponent
11 needs to show that the purpose or objective of
12 the request for attorney advice was in
13 furtherance of the fraud. It could be asking aid
14 to help it commit a fraud or continue to a fraud.
15 And you see that in the U.S. v. Collis case.

16 Most fraudsters don't just ask a lawyer,
17 hey, help me commit fraud. They oftentimes couch
18 their language in something perfectly legal. And
19 that's what happened here.

20 So with respect to 501(c)(4)
21 communications, FirstEnergy Solutions, through
22 its employees and agents, sought advice on
23 501(c)(4)s for the purpose of concealing the
24 source of the contributions to Larry
25 Householder's criminal enterprise and, thereby,

1 allowed it to conceal a fraud from the public.

2 With respect to the HB6 draft language
3 edit, that was clearly in furtherance of the
4 fraud because the purpose of bribing
5 Mr. Larry Householder was so that he would
6 deliver HB.6, and FirstEnergy Solutions used its
7 lawyers to ensure that it got what it paid for,
8 in other words, a billion-dollar bailout of its
9 nuclear power plants.

10 Energy Harbor is wrong for focusing on
11 what the legal question is. What's really
12 important to consider is what the purpose of the
13 legal ask was.

14 So there's almost no question that a
15 crime of fraud happened, which FirstEnergy
16 Solutions was a key participant. This was
17 admitted by FirstEnergy and Juan Cespedes at
18 Larry Householder's trial.

19 And the two pieces of advice at issue
20 are clearly connected to FirstEnergy Solutions'
21 goal in concealing their involvement in the fraud
22 and to take advantage of the improper access it
23 had gained from the fraud. These are all
24 activities in which the legal advice was sought
25 to further the HB6 fraud.

1 And so if there's ever a case where the
2 application of the crime-fraud exception, this is
3 one of them.

4 But I'll briefly touch on the
5 alternative basis for ordering Energy Harbor to
6 produce the documents concerning 501(c)(4)
7 contributions and the edits to the HB6 draft
8 language.

9 MR. JUDGE: Yes. If you would, walk me
10 through this part carefully. From what I
11 understand, there are three memorandums that are
12 at issue here.

13 MR. SCIARANI: Yes.

14 MR. JUDGE: And they intentionally
15 produced the memoranda. And your argument is, it
16 has firmly wiped out any claim of privilege, and
17 they're trying to backtrack on it now.

18 MR. SCIARANI: That's correct.

19 So Plaintiffs' view is that Energy
20 Harbor selectively produced three memoranda
21 because they shared it. And their basis for
22 doing so is that they shared it with Joel Bailey.
23 Joel Bailey was a FirstEnergy corporation
24 external affairs employee who reported to
25 Michael Dowling.

1 And Energy Harbor's position is that,
2 after the bankruptcy, Mr. Bailey was no longer
3 within the privileged group. We believe that is
4 pretextual. And I'll walk you through that.

5 MR. JUDGE: Yes.

6 MR. SCIARANI: And so the date at which
7 they claim the privilege ends between FirstEnergy
8 Solutions, FirstEnergy is the date of the filing
9 of the bankruptcy, which is in February of 2018.

10 So one of the important parts of
11 Plaintiffs' motion is that, in the Sixth Circuit
12 law, the law is strict. There is no selective
13 waiver in any circumstances. And in that
14 Columbia/HCA case, the court was clear to note
15 that selective waiver is prohibited in all of its
16 various forms.

17 And so, here, it's important to consider
18 some of the background that, prior to the
19 bankruptcy, FirstEnergy Solution and FirstEnergy
20 had the same legislative solution goal. They
21 needed a legislature bailout of the nuclear power
22 plants. And even after the bankruptcy, this
23 didn't change. The goals didn't change. The
24 activities didn't change. Joel Bailey was
25 involved in HB6. FirstEnergy Solutions, as we

1 discussed earlier, was involved in trying to get
2 HB6 across the line.

3 And so there's a consistent level of
4 activity at this point, right; although, there's
5 not a consistent level of activity with regard to
6 the assertions of privilege.

7 And FirstEnergy Solutions operated under
8 a shared service agreement with FirstEnergy, and
9 that involved using FirstEnergy's corporate
10 external affairs department and legal support.

11 In its bankruptcy settlement with
12 creditors, FirstEnergy agreed to act as FES's
13 agent in lobbying matters. And so this activity
14 was conducted by FirstEnergy and FirstEnergy
15 Solutions in parallel.

16 However, after the allegations came to
17 light, after Mr. Householder's arrest, there's
18 been an incentive on behalf of FirstEnergy and
19 FirstEnergy Solutions to overstate that degree of
20 separation which was effected by the filing of
21 bankruptcy. For example, in July 2020, Jones
22 said that FirstEnergy and FirstEnergy Solutions
23 were essentially completely separate after a
24 bankruptcy, but that wasn't true. And
25 FirstEnergy had to release a statement to correct

1 that, noting that there was a shared service
2 agreement.

3 So in addition to this consistent action
4 undertaken by FirstEnergy and FirstEnergy
5 Solutions, you see an inconsistent withholding of
6 documents under a privilege.

7 If you look at Exhibit 28, there's a
8 privilege entry which notes, Documents that were
9 shared with FirstEnergy counsel dated after the
10 bankruptcy -- that is titled "FES Business Plan."
11 And that's what's held under the common interest.

12 So that's where you see the selective
13 waiver, that in the context of FES business plan,
14 those documents are being withheld. In the
15 context of HB6 or 501(c)(4), for some reason,
16 those documents are not being withheld.

17 But the ultimate contradiction here is
18 that HB6 was a key part of FirstEnergy Solutions'
19 business plan. It was necessary for FirstEnergy
20 Solutions to get HB6 passed to help it emerge
21 from bankruptcy successfully.

22 And so even though FirstEnergy and FES
23 had separate legal departments, they worked
24 together. They worked together on HB6. They
25 worked together on 501(c)(4) donations. And they

1 apparently worked together on FirstEnergy
2 Solutions' business plan, but they have
3 selectively decided to disclose documents shared
4 with Joel Bailey.

5 And so what the selective waiver -- the
6 selective waiver rules that the Sixth Circuit
7 have set forth are designed to do is to prevent
8 the offensive use of privilege. And, here, we
9 have two examples in which that can occur.

10 The first is the idea that there is no
11 or little coordination between FirstEnergy and
12 FirstEnergy Solutions in the conspiracy to bribe
13 Mr. Householder. The fact that they're waiving
14 the privilege with respect to the documents
15 shared with Joel Bailey suggest that FirstEnergy
16 and FirstEnergy Solutions independently arrived
17 at their discussions and not that FirstEnergy had
18 any control or gave direction to FirstEnergy
19 Solutions's decision-making.

20 The second matter in which you could see
21 an offensive use of the privilege is if you take
22 a look at Defendant John Judge's answer, and it
23 includes this idea that he relied in good faith
24 on others, which could also include relying on
25 counsel. The problem here is that the counsel

1 that these defendants are relying on, the
2 privilege is held by the company. And so the
3 individual is unable to waive the privilege to
4 assert that defense.

5 So, here, what you see happen is, Energy
6 Harbor waives the privilege as to certain
7 documents which puts them into the record so that
8 Mr. Judge could rely on them in support of his
9 defense.

10 And so with respect to that defense, if
11 you look at the 501(c)(4) memorandum, for
12 example, that suggests that donations of
13 501(c)(4) that Energy Harbor or FirstEnergy
14 Solutions did were blessed by its lawyers. But
15 Plaintiffs here have no other documents to assess
16 whether or not that reliance was done in good
17 faith, because the rest of those documents have
18 been withheld.

19 The HB6 draft memo suggests that certain
20 edits were not adopted by the legislature
21 regarding HB6, and that could be used to suggest,
22 on behalf of FirstEnergy or FirstEnergy
23 Solutions, that they didn't really have a level
24 of access that Plaintiffs allege.

25 So here we have Energy Harbor using a

1 selective waiver to prevent a narrative that it
2 was not cooperating with FirstEnergy in
3 perpetrating the fraud that FirstEnergy has
4 admitted to committing and that their employees
5 were justified in their actions.

6 And so just going back to the general
7 principle of the Sixth Circuit, because all forms
8 of selective waiver are not permitted in the
9 Sixth Circuit, Energy Harbor has waived its
10 privilege with respect to the subject matter of
11 the 501(c)(4) donations memo and the draft edits
12 to the HB6 language.

13 MR. JUDGE: Let's talk about that for a
14 moment. In the relief requested at the end of
15 your initial -- the memorandum in support of the
16 motion to compel, I believe you phrased it as
17 that you were asking for -- I'm going to screw
18 this up unless I pull it up. Hold on a second.

19 Okay. Document Number ECF Number 491-1,
20 page ID number 10557, in your second point,
21 you're asking, quote, Produce all documents
22 withheld an attorney-client privilege concerning
23 donations to 501(c)(4) organizations and the
24 drafting of clean energy legislation, such as
25 HB6.

1 Why so expansive? Why aren't we
2 targeting specific 501(c)(4) organization, not
3 just any that may be involved? And why a wider
4 net of anything related to the drafting of clean
5 energy legislation? Why not just related to HB6?

6 MR. SCIARANI: So I'll start with
7 respect to the 501(c)(4) donations.

8 If we look at the memo, it was a Calfee
9 memo that describes just some of the rules and
10 regulations behind 501(c)(4) donations, including
11 that the IRS won't disclose certain names of
12 donors. That memo is general in its effect.

13 However, I think, with respect to the
14 scope of discovery in this case, you're going to
15 focus on the 501(c)(4)s at issue in this.
16 Namely, for purposes of FirstEnergy Solutions,
17 it's going to be Generation Now or 501(c)(4)
18 donations in general.

19 So while the ask may seem a little bit
20 larger, I think, when you look at it in the
21 context of this case, it's actually quite narrow.
22 It would be anyone that Energy Harbor donated to
23 that ultimately could be attributed to
24 Mr. Householder's criminal conspiracy.

25 With respect to HB6, FirstEnergy and

1 FirstEnergy Solutions had been looking for a
2 legislative solution throughout the class period,
3 and that's a big part of their motivation of
4 potential scienter -- basis for their scienter in
5 this case.

6 In 2017, they were proponents of this
7 thing called ZEN legislation, which also would
8 have resulted in a nuclear bailout for
9 FirstEnergy Solutions.

10 And so what you see here is that there
11 is a topic. The subject matter is the bailout
12 legislation. And so that could be HB6 or it
13 could be ZEN, but it's still a very narrow
14 concept. We're not talking about other types of
15 energy legislation that they may have had an
16 interest in.

17 MR. JUDGE: Okay.

18 MR. SCIARANI: So, you know, that ends
19 my spiel here. I'd like to just reserve time to
20 briefly address any comments that Mr. Streeter
21 may have.

22 MR. JUDGE: Of course. Thank you,
23 counsel.

24 Mr. Streeter.

25 MR. STREETER: Thank you very much.

1 So I'm going to start with the last
2 point first which is the selective -- the subject
3 matter waiver point.

4 First of all, it's important to point
5 out that in their briefs and here today at this
6 argument they cite selective waiver cases in the
7 Sixth Circuit, the Columbia/HCA case. And what
8 that case says, that when you give privileged
9 documents to one party, like the government or
10 your auditors, you can't withhold them from
11 another party like the plaintiffs.

12 That is not what happened here. This is
13 not a selective waiver. We have not selectively
14 picked and choose who we would give the documents
15 to and who we would not. Everybody has the same
16 documents. The plaintiffs have the same
17 documents. The government has the same
18 documents. Everybody has the same documents.
19 The Columbia/HCA case simply doesn't apply. That
20 is a totally different concept.

21 What we are dealing with here instead is
22 a question of whether or not subject matter
23 waiver should apply. And subject matter waiver
24 depends on whether or not, in fairness, the
25 document should be disclosed. And what does that

1 mean?

2 MR. JUDGE: Talk to me about the Muni
3 case that they cited.

4 MR. STREETER: So what the issue is, is
5 whether or not we have strategically offered
6 certain privileged documents but withheld other
7 ones for some strategic advantage, and it's
8 simply not the case that we have done that.

9 We have no strategic interest in this
10 litigation. We simply do not. We are not a
11 party. We don't have any interest in the outcome
12 in the case. We are not offering these documents
13 for anything. We are producing them in response
14 to a subpoena. We simply have no reason why we
15 would want to make some affirmative argument in
16 this case. We are not making any affirmative
17 arguments in this case.

18 We simply made a good faith
19 determination that because these documents, a
20 year before there was any litigation, had been
21 inadvertently shared with Joel Bailey who worked
22 for a different company at the time, that we made
23 a determination, based on our good faith analysis
24 of the privilege law, that we could not assert
25 privilege over those documents, those several

1 documents because they were inadvertently
2 disclosed to Joel Bailey. We did not pick and
3 choose and make a strategic call: Gee, we'd like
4 to turn this document over, but we're not going
5 to turn over this document.

6 We simply looked at the documents that
7 were shared with Joel Bailey, and we determined
8 that we could not withhold those based on
9 privilege, because Joel Bailey was not an
10 employee of our company and was not in our
11 privilege group. That's what happened here.

12 There was no strategic gambit run or any
13 sort of attempt at gamesmanship or selectivity or
14 an attempt to disclose certain things but not
15 other things.

16 We simply went through and said, Joel
17 Bailey wasn't an employee; which documents was he
18 sent. That was a year before any investigation
19 or any litigation was even imagined by anybody.
20 We're going to have to turn those over.

21 And by the way, we were told that
22 FirstEnergy, which had the documents because
23 Joel Bailey was their employee, intended to turn
24 them over as well.

25 So we turned those documents over

1 because a year earlier, before there was any
2 litigation for anybody to have any strategy
3 about, they had been inadvertently shared with
4 Mr. Bailey.

5 Now, there are two things about this
6 that are important.

7 Number one, the rules clearly say that
8 an inadvertent disclosure of privileged material
9 does not give rise to a subject matter waiver.
10 It gives rise to a waiver over the specific
11 document. And we have acknowledged that, and
12 that's why we produced them. But it does not
13 give rise to a subject matter waiver.

14 Judge Jolson, in the Murray Energy case,
15 made very clear -- and this is, you know, a very
16 thorough opinion, that subject matter waiver is
17 an extraordinary measure given the importance of
18 the privilege.

19 And she set forth in the Murray Energy
20 case that this is not to be done lightly; it is
21 to be analyzed very carefully; that it is
22 considered very narrowly. And she also set forth
23 that fairness is the touchstone. Did a party try
24 to gain strategic advantage by disclosing certain
25 documents and not other documents? That's just

1 not the case.

2 What happened was, a year before anybody
3 even imagined that there will be an investigation
4 about this, from 2018 and early 2019, some people
5 made a mistake and gave certain documents to
6 Joel Bailey. And now, as a consequence of that,
7 we understand that the privilege doesn't apply to
8 them. And so we produced them in this litigation
9 and to the DOJ and to the SEC and to the Attorney
10 General of Ohio. We did not sit down and decide,
11 let's produce this one but not this one. So
12 there is no strategic fairness question here.

13 And, furthermore, we have no strategy in
14 this litigation. We're not a party to it. So we
15 don't have any interest in strategizing about
16 these kinds of outcomes. We're not a defendant
17 in this lawsuit.

18 So, you know, for those two reasons,
19 both because this was an inadvertent disclosure a
20 year before there was any litigation and because
21 we did not engage in sword-and-shield strategic
22 gamesmanship, there simply cannot be a subject
23 matter waiver, which is an extraordinary measure
24 that cannot be taken lightly. These are
25 privileged documents that they're seeking to

1 obtain, and this is an extraordinary measure.

2 Now, the argument that they make is that
3 we have declined to assert common interest
4 privilege over these documents. There are two
5 serious flaws with that argument.

6 Number one, there was no common interest
7 agreement between these two companies. Both the
8 general counsel of Energy Harbor has said that in
9 its declaration, and Jones Day informed me of
10 that in a conversation about what FirstEnergy's
11 position was. We cannot create a common interest
12 agreement between two parties who don't have one.

13 And, secondly, there couldn't have been
14 one at the time that the documents were turned
15 over to Mr. Bailey because there was no
16 litigation.

17 The common interest privilege applies
18 when there is contemplated or actual litigation.

19 And a year earlier, before any
20 investigation, there was no litigation. There
21 was no common interest, period.

22 And so there has been no strategic
23 declining to assert the common interest privilege
24 here, because we couldn't assert it because there
25 wasn't a common interest agreement, and there

1 couldn't have been one because there was no
2 litigation around which to have a common interest
3 agreement. And so the subject matter waiver
4 doctrine just simply didn't apply here.

5 And I'll pause there, because I know
6 that you have questions about this particular
7 issue, and I want to make sure that I address
8 them before I move to the other topics.

9 MR. JUDGE: You made proceed. If I have
10 a question, I won't be shy. Trust me.

11 MR. STREETER: Okay. So now I want to
12 move to the crime-fraud sections of privilege.

13 Again, an extraordinary measure to
14 decide that there's a crime-fraud exception to
15 the privilege and to use that to access
16 privileged documents of the company. I want to
17 make a couple of preliminary comments about this.

18 The Department of Justice and the SEC
19 have had all of these documents that the
20 plaintiffs have and all of the privilege logs
21 that the plaintiffs have for more than two years,
22 and they have never claimed that there was a
23 crime-fraud exception here that would result in
24 appreciation of the privilege.

25 They, also, by the way, have had all

1 these documents for two years and never claimed
2 any kind of subject matter. They've had the
3 documents for much longer than the plaintiffs
4 have had them. They've never made that claim.
5 And I think that's significant.

6 The second thing I want to say about the
7 crime-fraud exception is shedding light on the
8 credibility of the plaintiffs' claim. We had an
9 almost yearlong meet-and-confer process before we
10 got to have this dispute brought before Judge
11 Jolson and now you. In an almost yearlong
12 meet-and-confer process where me and Mr. Sciarani
13 and others from his firm were talking about all
14 of these issues -- and they never ever raised
15 crime-fraud once during that process.

16 At 9:56 p.m. the night before these
17 issues were raised before Judge Jolson, they sent
18 us an e-mail saying, Oh, by the way, it just
19 occurred to us to make this argument, too.

20 So they threw it in there at the last
21 minute. And so that shed some light on their
22 credibility of the claim.

23 Now let me talk about the substance of
24 it.

25 MR. JUDGE: Go ahead.

1 MR. STREETER: Again, Judge Jolson has
2 written carefully in the Murray Energy case.
3 Again, the same case discusses both crime fraud
4 and subject matter waiver. And I encourage you
5 to read it. And she has very carefully set forth
6 that, again, this is not something to be done
7 lightly; and, furthermore, there are two elements
8 that need to be demonstrated: Number one, that
9 the client was engaged in or planning a crime
10 when the communication occurred and that the
11 communication with the lawyer was intended to
12 facilitate that crime.

13 Now, neither of those things are true
14 here. Let me tell you why.

15 Number one, I understand that there has
16 been an enormous amount of attention on the case
17 in Ohio. But the reality is, as we sit here
18 right now, three years after Larry Householder's
19 arrest, Energy Harbor has not been charged with a
20 crime. It has not been sued by the SEC. It is a
21 defendant in a civil lawsuit before the Attorney
22 General. It settled another lawsuit for \$11
23 million. It has not been accused of a crime.

24 And there's a reason for that. And
25 here's why: The documents that we produced to

1 the plaintiffs show Energy Harbor's perspective
2 on this was that it was making donations to a
3 501(c)(4) so that that 501(c)(4) could fund a
4 media campaign in support of a piece of
5 legislation and fund an anti-referendum effort in
6 support of a piece of legislation.

7 There is no evidence in any of those
8 documents that anybody at Energy Harbor was
9 trying to engage in a quid pro quo with Larry
10 Householder or anybody else.

11 If you look at the documents attached to
12 Mr. Sciarani's declaration, both the original
13 declaration and the ones that they put in the
14 reply brief, which we have not had an opportunity
15 to respond to, you'll these that every one of
16 those documents, the text messages, the e-mails,
17 all of them involved Energy Harbor providing
18 money to fund media campaigns, providing money to
19 fund anti-referendum efforts.

20 And, Mr. Judge, I'm guessing you were
21 living in Ohio at the time and you saw the ads on
22 TV. That's what Energy Harbor was paying for.
23 And you might have even had signature gatherers
24 come to your house and try to get you to sign a
25 referendum or an anti-referendum. That's what

1 Energy Harbor was paying for.

2 If you look at those documents, you will
3 see that every time that's what it's about. For
4 instance, Exhibit 49, which Mr. Sciarani attached
5 to his reply declaration, is a request by the CEO
6 of Energy Harbor for the board of Energy Harbor
7 to approve a \$15-million payment to Generation
8 Now to fund a media campaign, completely legal
9 conduct, First Amendment protected conduct.

10 Now, is it pretty? Is it nice? No. I
11 don't think that American politics are always
12 pretty and nice. But people donate money, and
13 they put money into media campaigns to support
14 legislation that helps them, and that's not
15 illegal.

16 What's illegal is bribing someone. And
17 there is no evidence that anybody at FES had any
18 intention or knowledge that Larry Householder or
19 anybody else was being bribed. And it's
20 important.

21 Mr. Sciarani has tried to mix these
22 companies together. The way to think about this
23 is, these companies were in the middle of a
24 divorce. They were separated, and they were
25 working on a divorce. And the divorce finalized

1 on February 27th, 2020.

2 But during the separation period,
3 between when bankruptcy was filed on March 31st,
4 2018, and February 27th, when they completely
5 separated, they had separate boards; they had
6 separate executives; they had separate legal
7 departments; they had separate general counsel;
8 they had separate outside counsel.

9 And yet Mr. Sciarani consistently says
10 we're trying to say that we didn't coordinate
11 with FirstEnergy. That's just not true. We
12 don't say that. We absolutely acknowledge that
13 we did coordinate with them and that we did, you
14 know, receive advice from them about things we
15 should do. There's no doubt about it, and we
16 don't run away from that fact at all.

17 We're not attempting to claim there was
18 no coordination as part of some sword-and-shield
19 scandal. We don't claim it, and so it's just not
20 true.

21 The reality is that we were a separate
22 company that was in the middle of a divorce, and
23 the divorce was finalized in February of 2020.
24 But during that separation period, we believed --
25 and all the documents support this -- that we

1 were paying for a media campaign and that we were
2 paying for an anti-referendum effort.

3 And to the extent any of those monies
4 were diverted to Larry Householder's benefit or
5 to someone else's benefit, they were stolen from
6 my client. They were stolen from Energy Harbor.

7 And I can show you, and they were
8 produced in the documents that Mr. Sciarani has,
9 the bills from the media companies to pay for all
10 those ads that you saw and all those signature
11 gatherers that came and pounded on your door.

12 And that is not a bribe. Paying for ads and
13 paying for signature gatherers is not a bribe.

14 And donating money to a 501(c)(4) so it can
15 support politicians running for office who
16 support your cause, namely, you know, a clean
17 energy bill in Ohio, is not a bribe.

18 And so that's why I say there was no
19 crime being committed by Energy Harbor,
20 FirstEnergy Solutions at this time. Whether or
21 not Larry Householder and FirstEnergy and other
22 people were engaging in crime, I leave to others.
23 But the evidence has been, you know, produced to
24 the plaintiffs.

25 And if you look at those documents, you

1 will see every one of them is a discussion of
2 funding a media campaign or an anti-referendum
3 campaign, not a crime.

4 Now, the second question, which
5 Judge Jolson lays out in the Murray Energy case,
6 is whether or not the communication was
7 designed -- the communication with the lawyer was
8 designed to facilitate a crime. And that, also,
9 element is not met here.

10 First of all, you could look at the
11 memorandums. Getting ready to make a donation to
12 a 501(c)(4) and consulting with your lawyer about
13 the guideposts for doing so, which is what the
14 memo with Calfee is about -- it's about what are
15 the guideposts for 501(c)(4) contributions. That
16 is not something unusual or strange. 501(c)(4)s
17 receive donations from companies all the time.
18 It's not a crime. It's not anything facilitating
19 a crime. And so that Calfee memo that was sent
20 in 2018 is just simply not part of facilitating a
21 crime or anything like that.

22 Secondly, there is the draft legislation
23 language. So there are subsequent Calfee memos
24 where Calfee is giving advice about language that
25 should appear in the legislation. Again, this is

1 not a crime. This happens all the time in our
2 politics, whether we like it or not, that
3 companies and interested people advocate to
4 legislatures about what should appear in
5 legislation that affects them.

6 And they go so far as to proposed
7 language. And that's what was going on here, and
8 that's what Calfee was doing. And Calfee was not
9 participating in or facilitating a crime. They
10 were offering language that might appear in a
11 piece of regulation. Nothing unusual about it.
12 Nothing illegal about it.

13 There was no evidence and there is no
14 evidence that Energy Harbor was engaged in some
15 sort of quid pro quo with Larry Householder. As
16 I said, if some benefit and some money went to
17 Larry Householder to pay for his house in Florida
18 or his legal bills or whatever it went to or
19 whatever other purpose he might have used it for
20 other than the ones that my client agreed to, it
21 was stolen from my client, and my client was not
22 engaged in a crime.

23 And so, you know, the bottom line is
24 that the crime-fraud exception just doesn't
25 apply. No one else in any of the other

1 litigations has suggested that it does. And the
2 plaintiffs themselves, you know, sort of threw
3 this in at the eleventh hour, 11:59 p.m., you
4 know, in the proverbial clock.

5 MR. JUDGE: Without reading anything
6 into the following two questions I have, the
7 first one is, the cost-shifting. Talk to me
8 about cost-shifting a little bit.

9 MR. STREETER: Yes, I'll talk to you
10 about the -- let me talk to you about the
11 extended time period now, and I'll get to that
12 issue.

13 And, look, I mean, the first two
14 questions, the crime-fraud question and the
15 subject matter waiver question, these are legal
16 issues that, you know, is frankly not much of a
17 matter of discretion.

18 And I acknowledge that the question of
19 how long a period of time you want to subject us
20 to discovery is at your discretion. And I came
21 into this thinking, you know -- and I'll explain
22 to you kind of what kind of a, you know,
23 potential compromise position is on that subject
24 matter. First, I want to frame it out for a you
25 a little bit.

1 So as we sit here today, Energy Harbor
2 has produced 85,000 documents to the plaintiffs.
3 They produced those documents over a four-year
4 period, from September of 2016 to July of 2020.

5 We did an exhaustive search and showed
6 them the list of custodians. We showed them the
7 search terms. We did an exhaustive search and
8 spent an enormous amount of time and effort
9 producing those documents to them and to other
10 litigants and to other parties.

11 As recently as last week, we produced
12 2,000 additional documents to them when they gave
13 us additional search terms that they wanted us to
14 run against certain people's materials. And as
15 early as last week, we produced an additional
16 2,000 documents to them. Prior to that, we
17 produced another, you know, 850 documents to them
18 that they had asked us to run certain search
19 terms. And we ran them, and we produced the
20 documents. We've given them detailed privilege
21 logs of everything, and that's what we've done so
22 far.

23 Now, let's frame the time period that
24 we're talking about, this so-called extended time
25 period, a period from July 21st, 2020, to

1 December 31st, 2020, the period of time after
2 Larry Householder was arrested.

3 Now, let's talk about what that time
4 period is. It is more than a year after House
5 Bill 6 became law and was passed by the Ohio
6 legislature and signed by Governor DeWine. So
7 it's more than a year after the events that are
8 really at the heart and soul of this House Bill
9 6, you know, scandal. It's nine months after the
10 referendum campaign had come to an end and failed
11 in October of 2019. So it's nine months after
12 any of those events occurred, which I admit
13 wholly our client was involved in.

14 We were funding anti-referendum efforts
15 to try to support a piece of legislation that
16 included paying signature gatherers and paying
17 for TV ads and mailers to try to prevent that
18 referendum from succeeding. Not a crime.
19 Unsavory, perhaps, but not a crime. And it's
20 more than five months after the two companies
21 were completely separated when the divorce was
22 finalized on February 27th, 2020. They were no
23 longer in any way connected after that.

24 You know, they obviously had, you
25 know -- and so it's just -- the extended time

1 period that they're focused on is well after any
2 of the events in question and well after any
3 affiliation between the companies.

4 Now, they have offered up a couple of
5 reasons why they should get at documents from
6 this time period that's well after the events in
7 question which would impose enormous costs and
8 burden upon Energy Harbor.

9 First, they said we've made allegations
10 that are included in that time period; and that
11 is so, but those allegations are about
12 disclosures that FirstEnergy made or didn't make
13 or made inaccurately. Energy Harbor, my client,
14 had absolutely nothing to do with those
15 disclosures. It had been a separate company with
16 a totally separately existence, divorced in the
17 bankruptcy for more than five months at the point
18 when those disclosures were made. And so Energy
19 Harbor had nothing to do with those disclosures.

20 And by the way, neither did John Judge,
21 who no longer worked for FirstEnergy for a long
22 period of time at that point in time.

23 Secondly, they have said that they
24 speculate or conjecture that maybe some people at
25 Energy Harbor said things that are inculpatory

1 after the arrest of Larry Householder. Now,
2 first of all, this is total speculation.

3 Secondly, I'm not sure how it is that a
4 statement by someone at a different party, made
5 many months after the events in question, could
6 be relevant to their lawsuit anyway, because it's
7 not admission by a party in a lawsuit.

8 The next thing is, that it's also highly
9 unlikely. Because what happened, as soon as
10 Larry Householder was arrested, Energy Harbor got
11 a subpoena, immediately engaged counsel and sent
12 a document hold notice to all its employees
13 saying, Documents are going to be gathered.

14 So the likelihood that people made, you
15 know, inculpatory remarks when counsel was -- all
16 over the organization, when document hold notices
17 were being sent out, when a huge scandal had just
18 broken, is highly, highly unlikely. And, also,
19 for the reasons I said, I'm not sure how it would
20 be relevant to a lawsuit against FirstEnergy.

21 Now -- and by the way, on this subject,
22 also, neither DOJ nor the SEC has asked for
23 documents after Larry Householder's arrest on
24 this theory again.

25 And, you know, but at the same time,

1 look, in the interest of trying to get to a
2 solution here that doesn't impose enormous
3 burdens on my client, I think it might make sense
4 for us to look at a one-month time period after
5 Larry Householder's arrest to try to find whether
6 or not there are these kind of inculpatory
7 documents that they are talking about.

8 But to extend it out to the end of the
9 year, it just makes no sense. It's incredibly
10 expensive. It's going to involve a huge
11 privilege ticket, because counsel had been
12 engaged in many, many communications about House
13 Bill 6, about these matters with counsel,
14 obviously. It's going to be an absolute
15 privilege mess. And wading through that is going
16 to be incredibly expensive.

17 So, you know, I think, in the interest
18 of compromise, we could look at a one-month time
19 period. But if it's anything more than that --
20 would be wholly inappropriate. That is, you
21 know, my thoughts on this.

22 In terms of, you know, the
23 cost-shifting, look, we certainly don't have any
24 interest in this litigation. I understand that
25 we were, you know -- were a wholly-owned

1 subsidiary of FirstEnergy before. And I get that
2 we donated the money we donated as part of this
3 media campaign and anti-referendum effort. But
4 we do not have any interest in the litigation.

5 And so imposing a great deal of
6 additional costs on us is just not fair, and
7 that's -- my proposed solution is the one-month
8 solution to cut through that last issue.

9 MR. JUDGE: How much would one month
10 cost you?

11 MR. STREETER: Well, we estimated that
12 five months would cost us approximately a million
13 dollars.

14 And the way we did that is, we looked at
15 the time period we had collected for before that,
16 and we basically did kind of pro rata analysis.
17 So I think a fair estimate would be one-fifth of
18 one million, so one month, \$200,000.

19 MR. JUDGE: And are you using a private
20 vendor, or are you doing this in-house?

21 MR. STREETER: We have a vendor that we
22 use regularly who's not part of our law firm but,
23 you know, who we paid pay, who houses documents.
24 So they will gather documents, house them,
25 platform them for us, and we'll review them. But

1 otherwise, the review will be performed by
2 lawyers at this law firm.

3 MR. JUDGE: What vendors do you use?

4 MR. STREETER: I can't remember what
5 it's called as I sit here right now, Mr. Judge.
6 It is a -- it's one that we sort of have a
7 preferred arrangement with them, and they have
8 platformed all the documents that we've, you
9 know, produced so far, including the documents we
10 produced last week for the plaintiffs.

11 And, you know, the additional marginal
12 costs of platforming these documents, we can --
13 you know, we can zero in on that to the penny, if
14 we were so inclined. I mean, candidly, that's
15 not where the money is. The cost is in the
16 lawyer time to look at all these documents to
17 figure out, you know, whether they're responsive
18 and whether they're privileged and all those
19 kinds of things.

20 MR. JUDGE: So what percentage of the
21 one million is lawyer time?

22 MR. STREETER: I think my guess is, you
23 know, 95 percent. It may be even more. The
24 vendor bills are in the thousands of dollars a
25 month, not in the tens of thousands.

1 MR. JUDGE: Do I have in front of me --
2 I don't recall seeing it. I don't have any bills
3 in front of me or an affidavit laying out any
4 specific numbers, do I?

5 MR. STREETER: You don't. I mean, you
6 have my affidavit, which does this kind of pro
7 rata calculation, but you don't have legal bills
8 or vendor bills. We can provide them if you
9 want. We'd want them to be maintained in
10 privilege.

11 MR. JUDGE: Sure.

12 MR. STREETER: They're privileged
13 communications.

14 MR. JUDGE: And my second question,
15 without reading anything into it, is to ask,
16 assuming innuendo kind of thing, is -- you heard
17 me question opposing counsel about the relief
18 that they requested, and is there a way to narrow
19 it down. Even if I would buy their entire
20 argument, are they looking for too much? Is
21 there a more narrow compromise in there that I
22 should be thinking about?

23 MR. STREETER: I don't think so, other
24 than this one-month compromise. And I'll tell
25 you why.

1 I mean, this company had lawyers doing a
2 lot of things. The plaintiffs' notice -- there
3 are about 13,000 documents on our privilege
4 log -- more of a detailed privilege log. And
5 trying to slice and dice that so there's -- I
6 mean, it's still going to be an enormous amount
7 of documents that are my client's privileged
8 documents that are going to be subject to
9 disclosure. And that is a very serious thing,
10 and I don't think that -- well, if we don't have,
11 like, a handful of ten documents or something, we
12 could go look at, it's a -- you know, it's a
13 company that was in the middle of a bankruptcy
14 that was in the middle of this House Bill 6
15 effort.

16 There are multiple law firms, you know,
17 both Ohio law firms and national law firms, that
18 are working for them. There are law firms
19 working for the creditor committees. You know,
20 all kinds of -- that's why the privilege log is
21 so long here, because there were a lot of lawyers
22 working on all these issues.

23 MR. JUDGE: Do you use in-house
24 associates to create -- review documents, code
25 them, create the privilege log, or are you using

1 any predictive coding?

2 MR. STREETER: So we did not do that.
3 We used search terms, and then we put eyes on the
4 documents.

5 Given the high-profile nature of this,
6 given that there's a Department of Justice
7 investigation and an SEC investigation and now
8 we're, you know, joining as a third party into
9 some of these civil litigation, we didn't feel
10 comfortable kind of using a -- a kind of a short
11 form here. It was important that -- first of
12 all, we needed to -- you know, we need to
13 understand everything.

14 And so it was important to, you know,
15 run search terms, narrow the documents that way,
16 put eyes on the documents, use that as a method
17 to determine the responsiveness and privilege.

18 MR. JUDGE: Thank you, Mr. Streeter.

19 Rebuttal argument very briefly.

20 MR. SCIARANI: I'll try and make this
21 brief.

22 Counsel for Energy Harbor, you know,
23 they mentioned what the SEC and the DOJ have
24 done. I think it's important to know that we
25 don't really know what their thinking is at the

1 SEC or the DOJ. And there's some important
2 differences between our cases here.

3 This is a securities class action that's
4 focused on FirstEnergy. The DOJ, you know,
5 initially, at least with respect to the trial,
6 was focused on Larry Householder and most of his
7 associates.

8 MR. JUDGE: My perspective is, you know,
9 although interesting, I really don't care what
10 the SEC and DOJ are doing. They may have
11 something planned. They may not. They may --
12 change of view. I'm not going to engage in
13 mind-reading or attribute to them anything that's
14 going to form the decision. So move on from that
15 point, please.

16 MR. SCIARANI: Okay. And so with that,
17 you know, Plaintiffs' allegations also include,
18 under Rule 10b-5, a scheme liability allegations,
19 which Judge Marbley has upheld.

20 So this case goes beyond just false
21 statement, lies of statement, false scienter. It
22 also involves this scheme to defraud that's
23 alleged in the complaint.

24 To Mr. Streeter's comment about there
25 being no allegations or essentially the fraud

1 being completed as of October 2019, Mr. Cespedes
2 testified at Mr. Householder's trial that
3 FirstEnergy Solutions was continuing to engage in
4 the Householder scheme by supporting the terms
5 limit initiative, which would have allowed
6 Mr. Householder to stay in office longer. And
7 that happened up until February of 2020 before it
8 fell apart due to COVID. And FirstEnergy
9 provided shared services until June of 2020. So
10 they were still -- the divorce was not completely
11 finalize at the end of -- the emergence of Energy
12 Harbor from bankruptcy.

13 And just to touch base on that one-month
14 proposal, Plaintiffs think that's far too short.

15 Mr. Cespedes, you know, he enters his
16 guilty plea in October of 2020, and there's this
17 investigation Energy Harbor had. And you've
18 heard Mr. Streeter say some of the conclusions
19 from the investigation, like the money was stolen
20 or, you know, they were unwitting participants.
21 The facts gathered in that investigation will be
22 relevant to those considerations and would help
23 perhaps point the finger at the individual
24 defendants in our case.

25 MR. JUDGE: If one month is too short,

1 what is a reasonable compromise?

2 MR. SCIARANI: Well, I figured it'd be
3 just some period of time at least after the
4 firing of Jones and Dowling, and Cespedes' guilty
5 plea. So you're looking at early November of
6 2021.

7 MR. JUDGE: So give me a number. How
8 long?

9 MR. SCIARANI: Well, I think you'd want
10 a couple weeks after that, so November 15th,
11 2021.

12 MR. JUDGE: Do you have any response to
13 Mr. Streeter's comments about the cost involved?

14 MR. SCIARANI: You know, I think the
15 cost involved shows that Energy Harbor's
16 interested. They're spending almost all their
17 money on lawyer time, ensuring that there's no,
18 you know, inadvertent disclosure of privileged
19 materials. And that's all because, you know, in
20 this case, through -- as it progresses,
21 additional information about Energy Harbor's
22 involvement could come to light, and it certainly
23 needs to be careful about that. And I understand
24 that would be what a prudent company would do.

25 And I think a lot of this still is

1 premature in a sense that I don't think Energy
2 Harbor's collected the documents, run search
3 terms, you know. And we are willing, of course,
4 especially under Rule 45, to take steps to
5 eliminate miss hits and unnecessary reviews. And
6 perhaps there's search terms that were more
7 relevant to the SEC or DOJ's investigation. And
8 so I think some of those arguments are premature
9 at this time.

10 And, certainly, Judge Jolson has already
11 rejected these arguments with respect to Partners
12 for Progress which donated a smaller amount of
13 money, had all its assets seized and had to pay
14 for its discovery itself, whereas Energy Harbor
15 is an ongoing concern.

16 MR. JUDGE: When you say some of the
17 arguments are premature at this time, what
18 exactly do you mean? I believe Mr. Streeter told
19 me you guys had been engaged in a meet-and-confer
20 for about a year before the motion to compel
21 landed on my doorstep.

22 MR. SCIARANI: So the parties reached an
23 impasse on the time period early in the process.

24 Energy Harbor took a position that they
25 weren't going to produce those documents;

1 however, Plaintiffs wanted to review the
2 privilege log and go through some of the
3 privilege issues and raise them on the list form.

4 So there hasn't been any discussion on
5 the time period issue. Most of our discussions
6 have been, as you could see, the complex -- a
7 little bit more complex nature of the
8 attorney-client privilege questions.

9 MR. JUDGE: Okay.

10 MR. SCIARANI: And if I may, I just have
11 a couple of quick responses. I'd like to focus
12 on the crime-fraud exception.

13 Mr. Streeter notes the Murray Energy
14 case, and I submit that, you know, the
15 crime-fraud case in Judge Jolson's view might be
16 for extraordinary measures, but this is an
17 extraordinary case.

18 And, in fact, there is evidence that
19 really shows kind of the conspirator nature of
20 FirstEnergy Solutions' involvement in this case.

21 If I take you back to the October 2018
22 meeting with Mr. Cespedes, Dave Griffing of
23 FirstEnergy Solutions and a couple of the other
24 lobbyists, at that meeting, Cespedes testified a
25 FirstEnergy lobbyist slid a check across the

1 table to Mr. Householder. And once
2 Mr. Householder looked at it, he said that he was
3 supportive of FirstEnergy Solutions' problem.

4 So, you know, that's the kind of
5 evidence that we have that showed that
6 FirstEnergy Solutions is more than just an
7 unwitting participant, that they actually went
8 there, when Householder needed the money the
9 most, and engaged in an action that optically
10 looks like a classic bribe.

11 MR. STREETER: Special Master, can I
12 address that last point that was just raised now
13 in this whole argument for --

14 MR. JUDGE: I'll give you a moment.
15 Just let him finish, and then I'll come back to
16 you.

17 MR. SCIARANI: Okay. And so there's two
18 other points that Mr. Streeter makes. One, that
19 Energy Harbor is not charged. I think we've
20 discussed that earlier. We can't attribute
21 exactly the charging decisions of the DOJ here.

22 But moving on to the idea that they
23 didn't know Larry Householder got a pecuniary
24 benefit, that he used the money to pay off bills
25 or whatnot, we also have to recall that one of

1 the benefits received by Mr. Householder -- and
2 this was known to FirstEnergy Solutions -- that
3 he was going to cement his power as getting
4 elected to speaker of the house, and that
5 required electing a full slate of pro-Larry
6 Householder candidates, sometimes referred to as
7 Team Householder. So there is a known benefit
8 that FirstEnergy Solutions provided to
9 Mr. Householder.

10 And just really briefly over the subject
11 matter waiver, I think their argument really
12 turns on this idea that sharing of documents with
13 Mr. Bailey was inadvertent.

14 These documents were shared with him
15 over a long course of period of time, and it
16 doesn't seem like, even though they separated
17 their legal departments, there was no instruction
18 not to share documents; there's no attempt to
19 claw those documents back.

20 And if you look at their idea that, hey,
21 this is, you know -- hey, there was no common
22 interest, right, because it, A, wasn't
23 litigation -- that's contradicted by the
24 withholding of a business plan document under the
25 common interest theory that was shared with the

1 FirstEnergy corporate. And you can see that in
2 the excerpts of their privilege log.

3 And so what really needs to be focused
4 on is that there has been a selective use of
5 privilege here where certain documents are being
6 withheld and certain documents are being
7 disclosed.

8 So thank you very much for your time,
9 Special Master Judge. And I can turn it over to
10 Mr. Streeter's final comment.

11 MR. JUDGE: Thank you, Counsel. I
12 appreciate it.

13 Mr. Streeter, briefly.

14 MR. STREETER: Thank you.

15 So with respect to the last point about
16 the bankruptcy plan document, that's a document
17 that was created as part of a litigation, namely
18 a bankruptcy, which is a litigation; and there
19 was a common interest agreement between the two
20 companies as part of a litigation. So that's why
21 that document was withheld, because it was a
22 litigation, and there was a common interest
23 agreement.

24 And so there was no strategic call made
25 to, you know, produce some and not others. It

1 was just a down-the-middle what's privileged,
2 what's not. And that document was privileged
3 because there was a pending litigation of
4 bankruptcy, and there was a common interest
5 agreement between the companies with respect to
6 that bankruptcy litigation. That's why that
7 document was withheld. It's not part of some
8 gamesmanship or selectiveness.

9 With respect to the October meeting with
10 Larry Householder, the handing over of the check
11 that occurred at that meeting -- and the
12 plaintiffs know this because they have the
13 documents that show it -- was recommended and
14 advised and directed by Akin Gump Strauss Hauer
15 and Feld, one of the most reputable law firms in
16 the country and one of the most reputable
17 government affairs advisors in the country. And
18 those documents were produced to them because
19 they're lobbying documents, not legal advice.
20 And so we gave those documents to them.

21 Furthermore, Geoff Verhoff, a lobbyist
22 at Akin Gump, was at the meeting. Certainly, Bob
23 Klaffky, a very reputable Ohio-based lobbyist
24 with a long, distinguished career, was at the
25 meeting.

1 And so as I said before, some of this
2 stuff is not pretty. There are campaign
3 donations in this country that are made, and
4 they're not done for people's health. People
5 make campaign donations to try to get elected
6 politicians who they want to see support what
7 helps them.

8 And Akin Gump and Bob Klaaffky did not
9 recommend the commission of a crime when they
10 recommended that FirstEnergy Solutions make a
11 donation to Generation Now so that it would
12 support politicians who would support their
13 agenda. That is not a quid pro quo. That is not
14 a crime. It may be something that some of us
15 would like to outlaw, but right now it's not
16 illegal to make donations to support politicians
17 who are running for office, to try to get them
18 elected.

19 And that's what Akin Gump recommended,
20 and that's why an Akin Gump lobbyist was there in
21 the room when that even occurred, and that's why
22 Bob Klaaffky, a reputable lobbyist from Ohio, was
23 there in the room.

24 And by the way, after they left that
25 meeting, they went to have a meeting with

1 Governor DeWine, and they made a donation to
2 Governor DeWine at the meeting that they had
3 later that day. And no one has suggested that
4 Governor DeWine engaged in a crime by accepting a
5 campaign donation. It is what it is. This is
6 not a crime.

7 MR. JUDGE: Thank you, Mr. Streeter.

8 Thank you, Counsel, both for your
9 arguments.

10 I'll take the matter under advisement
11 and issue a order -- due course.

12 I ask that if anyone obtains a
13 transcript copy, I don't care if you necessarily
14 file it on the docket at this point. Although,
15 if there would be an appeal of my order to
16 Chief Judge Marbley and Magistrate Judge Jolson,
17 it would need to be filed. But I ask that if you
18 obtain a copy of the transcript you provide it
19 with me as soon as possible. It would aid me in
20 my drafting, but it's not essential.

21 Okay. Victoria, how are you doing? Do
22 you need a break?

23 COURT REPORTER: I'm okay.

24 MR. JUDGE: Thank you.

25 That brings us to ECF Number 496. This

1 is nonparty Sam Randazzo. I believe we're going
2 to have different counsel argue.

3 Counsel if you would introduce yourself
4 for purposes of the record. And then upon
5 completion of that, if the Movant would go first,
6 I would appreciate it. Thank you.

7 MS. COCALIS: Good morning, Mr. Judge.

8 My name is Rachel Cocalis, and I
9 represent the Class Plaintiffs.

10 MR. CORCORAN: Good morning, Mr. Judge.

11 My name is Jeff Corcoran, and I
12 represent Mr. Randazzo and SFAO. And as I
13 mentioned earlier, I also have cocounsel here
14 with me, Mr. Roger Sugarman.

15 MR. JUDGE: Thank you.

16 Whenever you're ready.

17 MS. COCALIS: Given the fact that
18 there's been a ton of briefing on this and you
19 said that you're familiar with the papers and
20 that there's multiple orders, I'd be happy to
21 just answer any questions straightaway, or I can
22 make a brief statement, whichever you'd prefer.

23 MR. JUDGE: Why don't you do your brief
24 statement. I mean, if there's anything that you
25 feel that I need to know that would be

1 emphasized, please go ahead. I don't have
2 questions from the briefing that are in dire need
3 of being answered.

4 You know, rather than just listen to
5 everybody just regurgitate the brief, you know,
6 give me your key points to what you want to
7 emphasize today on both sides.

8 MS. COCALIS: Absolutely.

9 So one would be hard-pressed to find a
10 more interested party and a bigger player in this
11 litigation than Mr. Randazzo.

12 FirstEnergy had admitted to paying him a
13 \$4.3 million bribe. This is just one of the two
14 bribes at issue of this case, and is it, in fact,
15 the biggest bribe at issue.

16 Mr. Randazzo's underlying conduct is
17 referenced extensively throughout Plaintiffs'
18 complaint. It has been referenced in -- more
19 than referenced; it has been the subject of
20 testimony in 31 fact depositions.

21 Further, because certain individual
22 defendants denied that this \$4.3-million payment
23 was a bribe, it is one of the most hotly
24 contested issues in this case. That is why the
25 discovery regarding a \$4.3-million payment is so

1 critical to the parties here. And that is also
2 why, when Mr. Randazzo and SFAO refused to
3 produce these documents to Plaintiffs' subpoenas
4 seeking documents through December 31st, 2021,
5 solely on relevance grounds, Judge Jolson
6 unequivocally granted Plaintiffs' request and
7 ordered them to produce, quote, Any document
8 regarding the \$4.3 million within their
9 possession and custody or control, full stop.

10 When Mr. Randazzo and SFAO were dragging
11 their feet, on May 16th, the court basically
12 said, you know, knock it off and produce any
13 document regarding the 4.3 within your
14 possession, custody, or control, as I had it
15 written in my order.

16 Fast-forward to six months, they're
17 still refusing to produce documents regarding the
18 4.3 million that are within their possession,
19 custody, or control, from November 21st, 2020, to
20 August 31st, 2021, a modified proposal from Class
21 Plaintiffs -- it's modified from the subpoena --
22 or to collect Mr. Randazzo's e-mail from 2019,
23 the year FirstEnergy admits to bribing him, for
24 him to conduct acts on their behalf, from
25 cloud-based server stored locations rather than

1 clearly deficient local storage locations unless
2 Plaintiffs pay their costs.

3 These new objections and demands are
4 long overdue and waived. Mr. Randazzo and SFAO
5 did not raise these objections pursuant to
6 Rule 45 when they responded to Plaintiffs'
7 subpoena. They did not raise these objections
8 when Plaintiffs moved to compel the documents.
9 They did not raise these objections and new
10 demands to Judge Jolson before her April 5th
11 order.

12 When Judge Jolson issued her April 5th
13 order, they did not file an objection; they did
14 not file a motion for reconsideration; they did
15 not seek clarification based on any of these new
16 grounds and demands. Same with the May 16 order.

17 From Plaintiffs' perspective, this is a
18 really easy case. We're simply just asking you
19 to enforce the court's April 5th and May 16
20 orders directing them to produce any document
21 regarding the 4.3 million that is within their
22 possession, custody, or control.

23 Now, through my perspective and given
24 that you asked me to be brief, I don't want to
25 waste your time arguing these new objections like

1 the cost-shifting argument. But if you would
2 like me to do so, I'm happy to explain how the
3 overwhelming -- the case law generally and the
4 law of this case overwhelmingly confirm that
5 cost-shifting would not be warranted here.

6 MR. JUDGE: Not at this time. I
7 appreciate it. Thank you.

8 MS. COCALIS: Thank you.

9 MR. JUDGE: Counsel, your turn.

10 MR. CORCORAN: Thank you, Mr. Judge.

11 I want to start off with text of the
12 rules that are relevant here.

13 So under Rule 45, a party issuing a
14 subpoena is to supposed to take reasonable steps
15 to avoid imposing an undue burden or expense.

16 Then, of course, under Rule 26, there's
17 the requirement that the discovery sought be
18 proportionate.

19 My clients are nonparties to this case,
20 and yet the plaintiffs still don't really think
21 that there should be any meaningfully limit on
22 the discovery that's going to my clients.

23 So I want to touch very briefly on the
24 \$4.3-million payment that was just referenced by
25 opposing counsel.

1 MR. JUDGE: Let's start with this
2 question I have, though: What was ambiguous or
3 unclear about Magistrate Judge Jolson's April 5th
4 and May 16th orders?

5 MR. CORCORAN: Well, I don't think --
6 Your Honor, I don't think, for example, she
7 intended for production of, let's say, privileged
8 communications between counsel, you know,
9 relating to a \$4.3-million payment.

10 And, frankly, I don't even know what the
11 plaintiffs are saying that we haven't produced.
12 They're saying you just need to expand your time
13 search -- you know, your time period to look for
14 communications when Mr. Randazzo had retained
15 counsel, when he was preparing information for
16 them, and basically saying, see if you could find
17 anything in there.

18 I think that's the biggest problem, is
19 that they're trying to go far beyond the ultimate
20 events of the case, you know, where Mr. Randazzo
21 received a payment and things like that. And
22 they're trying to go to, you know, what's almost
23 exclusively going to be or exclusively going to
24 be communications with counsel. I think that's
25 our ultimate issue.

1 I mean, conceivable speaking, we could
2 run a search for documents that were, you know,
3 he sent last week relating to the \$4.3-million
4 payment. I could almost guarantee you that all
5 of those are going to be privileged.

6 So at a certain point in the litigation,
7 I think everybody recognizes and, frankly, even
8 the plaintiffs recognize that it just doesn't
9 make sense to continue to search for documents
10 relating to a particular issue, and there has to
11 be some sort of cutoff.

12 The cutoff that we picked was
13 November 20th.

14 And I think it's interesting -- you
15 heard earlier -- the compromised position that
16 the plaintiffs were putting forward with regard
17 to Energy Harbor was November the 15th.

18 So we actually went beyond what the
19 plaintiffs' compromised position is with Energy
20 Harbor. But the plaintiffs want us to get even
21 nine months beyond that and look for, again,
22 communications that are almost exclusively going
23 to be with counsel.

24 MR. JUDGE: Tell me what you've produced
25 following Judge Jolson's orders.

1 MR. CORCORAN: Thank you. Good
2 question. I can't give you the chronology of
3 which date was -- I can tell you we've produced a
4 total of 7,000. I think we've probably produced
5 a few thousand pages in the last, you know, few
6 months that I've been involved. I forget what
7 the initial production was, but the total was
8 about 7,000 pages.

9 We ran 13 very complex search terms that
10 were crafted by the plaintiffs. So they -- you
11 know, we originally did our initial analysis
12 relating to this before there was ever any kind
13 of subpoena. We were trying to figure out for
14 ourselves what documents were there, and we had
15 run search terms. We had our own cutoff being
16 November 20th, I believe, and we were just trying
17 to figure out what was there. And, you know, it
18 was not like we were trying to limit what we
19 produced or anything like that.

20 And then, of course, the plaintiffs
21 said, No, you need to go beyond that. You need
22 to run some additional search terms.

23 We ran 13 additional search terms, and
24 we produced responsive documents to that. And so
25 we've done that through November 20th, 2021 --

1 excuse me -- 2020, and we think that that's
2 ultimately what a reasonable cutoff would be.

3 Again, it's past the class period. It's
4 well past the ultimate events of the case, and we
5 think that's perfectly reasonable.

6 MR. JUDGE: Did you produce a privilege
7 log as well?

8 MR. CORCORAN: Yes, in accordance with
9 the -- I think there's a protocol, I believe, in
10 the case for privilege logs. We wouldn't have
11 logged communications between Mr. Randazzo and
12 his litigation counsel for this, but we did
13 include a privilege log.

14 And one of the things, Your Honor, that
15 really makes this review so difficult, at least
16 for the time period that I was, for example --
17 was reviewing documents, is Mr. Randazzo himself
18 was an attorney. So you have to be very careful
19 about, you know, what's being reviewed here.

20 And then the time period -- I keep going
21 back to this -- that they're looking for is when
22 Mr. Randazzo already had counsel. So they want
23 to go even beyond that, and they just want to go
24 through August of 2021.

25 And their purported basis for doing that

1 is that they say, Well, Mr. Randazzo was, you
2 know, still spending some of the money, you know,
3 that was from this purported bribe.

4 The problem with that, Your Honor, they
5 already know where the money went. They served
6 subpoenas for bank records, and they've actually
7 got, I think, all the way through the period that
8 they're searching for, you know, the account
9 records. So they know how the funds were
10 disbursed. And that was ultimately, I think,
11 what the origin of this dispute was about.

12 You know, the plaintiffs had gone to the
13 court and said, We want documents related to the
14 \$4.3-million payment.

15 You know, they want to know how it was
16 disbursed, because some of the defendants,
17 FirstEnergy representatives, had said, We think
18 we're making this \$4.3-million payment for a
19 specific purpose.

20 And so the court said, you know, You
21 need to talk about -- you need to produce
22 documents that reflect how this was disbursed.

23 The plaintiffs have that information.
24 They know.

25 What they're looking for is a classic

1 fishing expedition where they're saying, Well,
2 you know, he might have said something
3 inculpatory.

4 An attorney, Mr. Randazzo, who already
5 retained counsel, he might have, you know, said
6 something like, Oh, I just received this bribe or
7 something like that, which I think is
8 extraordinarily implausible, but that's what
9 they're fishing for. That's what this period
10 would consist of. That's the extended time
11 period.

12 And, you know, Your Honor, frankly, they
13 go back to -- they keep calling this a
14 \$4.3-million bribe. And, yes, FirstEnergy did
15 enter into the deferred prosecution agreement.
16 And I'm not privy to every single deposition
17 that's been taken in this case, but I know that
18 FirstEnergy was sanctioned, I believe, previously
19 for failing to provide somebody to substantiate
20 that. And, in fact, I'm unaware of anybody with
21 personal knowledge that's willing to say that
22 Mr. Randazzo received a bribe.

23 Now, the big caveat is -- again, I'm not
24 counsel in this case, but from what I can see
25 publicly, it doesn't look like that's been

1 substantiated.

2 So I don't think it's right to just
3 assume that this was a bribe. Mr. Randazzo had a
4 consulting agreement. The consulting agreement,
5 there was a payment due, and that's what was
6 paid.

7 So, you know, the plaintiffs like to go
8 back to just calling it a bribe. And, frankly,
9 you know -- and I don't think they've supported
10 that.

11 MR. SUGARMAN: One clarification on the
12 dates, if I may.

13 MR. JUDGE: Identify yourself for the
14 record.

15 MR. SUGARMAN: Certainly. I apologize.
16 This is Roger Sugarman. I am also counsel for
17 Mr. Randazzo and SFAO.

18 Before any subpoena was issued, before
19 any involvement in this litigation, Mr. Randazzo
20 provided his electronic devices, which are at
21 issue here, to a third-party vendor in April of
22 2020, I believe it was.

23 MR. CORCORAN: '21.

24 MR. SUGARMAN: And that was done, and
25 the search was conducted at that point in time.

1 The time frame for that search, Your
2 Honor, began in 2016; and the end date was
3 November 20 of 2020.

4 The significance of the November 2020
5 date involved for that search and this purpose is
6 that's the date on which Mr. Randazzo resigned
7 from the Public Utilities Commission of Ohio. So
8 it wasn't a random date selected out of thin air.
9 It was a date that was tied to whatever official
10 actions he may have been involved in while
11 serving his term on the Public Utilities
12 Commission of Ohio, which began in April of 2019.

13 So we went forward from 2016 through the
14 November 21, 2020 time frame. And those are the
15 time frame for which documents were searched and
16 for which documents have been produced.

17 I just didn't want it to go unsaid that
18 somehow these were some randomly selected days by
19 either Mr. Randazzo or SFAO. It has much
20 interest in obtaining what was on those devices
21 as anyone else, given the fact that those text
22 messages, for example, and other information was
23 out in the public domain.

24 Now what would be required, which is
25 important, is for those electronic devices to

1 meet the demand that the plaintiffs have asked
2 for, for this extended period, which extends both
3 beyond the class period, extends beyond the
4 Harbor Energy time period that was the subject of
5 the preceding hour of argument and discussion,
6 Your Honor, is -- to extend that time would
7 require those electronic devices, again, to be
8 collected by the third-party vendor we've used.
9 And, again, it would involved the review of those
10 documents. It would involve the analysis of what
11 is and what isn't privileged. It would review
12 the analysis of what is and what isn't responsive
13 to what the plaintiffs' have requested.

14 To your earlier point in terms of what
15 was and wasn't done in response to this court's
16 prior orders, I submitted a declaration, and I
17 would submit it again today, that what is
18 accessible and available to Mr. Randazzo and to
19 SFAO relevant to and related to the -- not
20 relevant to, but relating to the \$4.3 million,
21 within our custody, control, and possession, has
22 been provided to the plaintiffs.

23 What this motion to compel seeks is what
24 we believe and what we've described in our
25 papers -- and I don't think I need to repeat

1 myself -- are inaccessible documents that may or
2 may not contain information that the plaintiffs
3 believe they're entitled to.

4 MR. JUDGE: In which of those categories
5 did the 2019 e-mail -- I believe they've asked
6 that the 2019 e-mails be obtained from the
7 cloud-based services or sources rather than
8 otherwise. Has that been produced, or where did
9 that fall in the categories?

10 MR. SUGARMAN: Again, the search that
11 was conducted didn't reach to the cloud as I'm
12 aware of earlier. So those devices would, again,
13 have to be resubmitted for further collection,
14 detection, and review.

15 The inquiries we didn't make of our
16 vendor -- and I think we advised plaintiffs of
17 this at the time. You know, there may be audio
18 files. There may be iTunes. There may be
19 nothing in there, Judge. We don't know is the
20 honest answer that I can sit here and give to you
21 today. We just don't know.

22 But the e-mails were available, were
23 collected and were provided.

24 MR. CORCORAN: Mr. Judge, if I may weigh
25 in on that as well or provide some insight on

1 that as well.

2 The assumption that there's anything up
3 there in the cloud that we haven't already
4 produced is based on the assumption, as I
5 understand it, that the devices would not have
6 been synced at some point. And I'm not aware of
7 any reason to make that assumption and say that
8 the devices weren't synced.

9 So it's just one of those things where
10 the plaintiffs are saying there might be
11 something out there. You know, why don't you
12 guys go spend some money to go figure out if
13 that's true or not?

14 And our position is, well, if you want
15 to do that, then you should bear some of the
16 costs, ultimately, if you're going to be saying,
17 you know, there's another source where you could
18 potentially search. And we think it's not going
19 to be fruitful because we think that the devices
20 were synced the entire time. We think that's
21 something that they should pay for.

22 And, of course, the plaintiffs' position
23 is, you know -- I think, for most of the time,
24 the plaintiff is basically saying, We're not
25 going to pay for anything.

1 I think they may have offered to
2 compromise on the issue of a cloud search by
3 saying, Well, we'll advance you certain money,
4 but we want it paid back if Mr. Randazzo's funds
5 in Mr. Sugarman's trust are unfrozen.

6 So they're not really agreeing to
7 shoulder any of the cost at all potentially. And
8 so --

9 MR. JUDGE: A cloud-based search, how
10 much does it cost?

11 MR. CORCORAN: I think that's the one
12 that's in about the four-grand range just for the
13 search itself.

14 And I think what the idea was going to
15 be was to see if there's anything there that, you
16 know, wouldn't have been produced already from
17 the device itself.

18 And of course, you know, there could
19 potentially be some review time associated with
20 that if we have to review documents for that as
21 well.

22 MR. JUDGE: And how did Mr. Randazzo
23 have his devices? Were they automatically
24 synced? Does deleting on the local device delete
25 from the cloud as well? How did he have it set

1 up?

2 MR. CORCORAN: That's my understanding,
3 is that deleting from the local device deleted
4 from the cloud as well.

5 MR. SUGARMAN: It's on auto delete after
6 30 days, Your Honor.

7 MR. JUDGE: After 30 days.

8 MR. CORCORAN: Yes. For texts, those
9 would be auto-deleted after 30 days.

10 Special Master, there's also -- I think
11 you've already touched a little bit on the issue
12 of reasonable accessibility. There's a separate
13 issue with regard to some of these e-mails that
14 are beyond May 1st, 2021, which is part of the
15 extended period.

16 We have already -- as Mr. Sugarman
17 referenced earlier, there are e-mails between
18 November 2020 and then April 2021 -- were already
19 collected as part of the initial collection. But
20 if we have to go past May 1st, 2021, as the
21 plaintiffs are saying we should, we have to
22 perform an additional collection. The devices
23 would have to be re-imaged. I believe the
24 estimate we submitted for that was going to be
25 9,000, not including attorney time.

1 I think, you know, if there's
2 potentially documents that are there, they're
3 going to have to be reviewed. Like I said, I'm
4 assuming that the vast majority of all of them,
5 and perhaps all of them, are going to be
6 privileged. And so there's going to be an
7 expensive privilege review that would need to be
8 done as well.

9 And, again, it's one of those things
10 where we've said, you know, if the plaintiffs
11 really think that this is that important, if the
12 plaintiffs want to go fishing, then why aren't
13 the plaintiffs willing to pay anything for it?
14 The plaintiffs is just taking their hard-line
15 position that you just need to bear the cost for
16 everything.

17 And that's, of course -- we even
18 proposed a compromise. Right before they moved
19 to compel, they said, we're at an impasse, and
20 then they moved to compel.

21 So I do want to address the
22 cost-shifting issue because I do think it's
23 important.

24 So the three factors I think the parties
25 agree on are whether the nonparties interested in

1 the case -- who can more readily bear the costs
2 in the public importance.

3 So the nonparty factor -- the first
4 factor, my client's not a party to this case;
5 doesn't own the parties; isn't bound by, you
6 know, the determinations in this case.

7 This case isn't going to impact whether
8 the Department of Justice brings charges. He
9 really isn't an interested party in this case.

10 I mean, my opposing counsel mentioned
11 it's hard to imagine somebody who's more
12 interested. Well, no. You could think of a
13 nonparty owner or other -- or a nonparty employer
14 or something like that, someone who's very
15 closely connected.

16 You know, we are not aligned with
17 FirstEnergy. We obviously vehemently dispute the
18 statements that are made in the deferred
19 prosecution agreement.

20 So it's not like we're Partners for
21 Progress, which is one of the cases that's been
22 cited, you know, where Partners for Progress was
23 funded by FirstEnergy and, you know, was
24 controlled by FirstEnergy and had a common legal
25 interest. You know, Mr. Randazzo does not have a

1 common legal interest with FirstEnergy. And so
2 he really does not have an interest in this case.

3 I do want to bring up one mistake that
4 we did make in our filing. You know, we said
5 that Partners for Progress -- in trying to
6 distinguish the case that was cited by opposing
7 counsel, we said that Partners for Progress had
8 pled guilty. That was a mistake. It was
9 actually Generation Now that had pled guilty.

10 But the point is, in distinguishing, you
11 know, the case that's been cited where Partners
12 for Progress was required to bear its cost,
13 Partners for Progress is a corporate entity,
14 again, exclusively funded and controlled by
15 FirstEnergy and was claiming a common legal
16 interest.

17 So the second factor is the relative
18 burden on the parties and who can more readily
19 bear the burden of the cost for responding. And
20 I think it's pretty telling here that the
21 plaintiffs speak exclusively about Mr. Randazzo's
22 ability to pay. They don't talk at all about
23 their inability to pay. You know, the lead
24 plaintiff has assets of, I think, 58 million --
25 \$58 billion. You know, there are other

1 institutional investors that are also plaintiffs
2 as well.

3 So, you know, the court's supposed to be
4 considering the comparison of the relative
5 ability to pay, but the plaintiffs don't even
6 want to talk about their ability to pay. They
7 just want to talk about Mr. Randazzo. And,
8 frankly, what I think they talk about is
9 incomplete.

10 You know, Mr. Randazzo has been in
11 litigation with the Attorney General for some
12 time now.

13 The Attorney General has been trying to
14 freeze basically everything that Mr. Randazzo
15 owns. You know, he's frozen Mr. Sugarman's trust
16 account. He's filed affidavits of fact relating
17 to titles that have clouded title on my client's
18 property.

19 You know, there's this idea that
20 Mr. Randazzo just has all these resources. But
21 the reality is, is that it ignores what's been
22 going on recently.

23 You know, there's also this statement
24 that there was a bunch of money paid to an
25 attorney for a trust account for Loeb & Loeb,

1 which is one of my client's law firms. You know,
2 I think there was a \$2.5-million payment. But my
3 understanding, that's not accessible to my
4 client. That payment was deposited in
5 effectively the operating account for that firm.

6 So there's this idea that my client has
7 all this money to pay this. And, I think, Your
8 Honor, frankly, that's just inaccurate.

9 On the same score, the plaintiffs talk
10 about how my client received \$22 million from
11 FirstEnergy over a course of eight to ten years.
12 I forget the exact time period. But the reality
13 is, is that, as the plaintiffs know, there's a
14 very significant portion of that money that was
15 not kept by Mr. Randazzo. It was actually paid
16 out as part of a settlement agreement where
17 FirstEnergy was paying money.

18 So, again, I think, when you look at the
19 relative burden -- or excuse me -- the relative
20 ability to pay here, I think that factor weighs
21 very, very heavily in favor of cost-shifting.

22 MR. JUDGE: What are your client's
23 liquid assets? How much cash on hand? If you're
24 talking about 13,000 for re-imaging and the
25 search to do the cloud-based search plus attorney

1 time, how much are we talking? You know, what
2 does your client have available?

3 MR. CORCORAN: Well, I don't know, you
4 know, down to the penny of what my client has.

5 Like I said, the big thing that I know
6 about are the things that I just referenced, that
7 the plaintiffs have been referencing, you know,
8 the \$3 million that's gone into trust accounts.
9 Part of that's frozen, and part of it's not
10 accessible.

11 MR. JUDGE: No, I am not asking what's
12 unavailable. I'm asking what's available.

13 MR. CORCORAN: I can't speak to that
14 myself right now. Mr. Sugarman, perhaps, has
15 more knowledge on that issue.

16 MR. SUGARMAN: Well, let me just
17 start -- on our filing, we estimated the cost of
18 compliance with the motion to compel,
19 paragraph 30 of my declaration, Your Honor, to be
20 roughly -- you know, a range -- 25- to \$31,000.

21 MR. JUDGE: I mean, I appreciate that
22 that's -- within other people's resources. How
23 can I evaluate whether it's fair to ask your
24 client to pay all of that, a portion of that, or
25 none of that when I don't know your client's

1 circumstances?

2 MR. SUGARMAN: Sure. I don't want to
3 speculate, which is what I'd exactly have to do
4 to be responsive.

5 If you would want us to supplement what
6 we filed with some financial information to
7 address that point, we could certainly do that in
8 a timely fashion. Otherwise, I'm just guessing,
9 frankly, because I don't know.

10 MR. JUDGE: Thank you, Mr. Sugarman.
11 Counsel, you may continue.

12 MR. CORCORAN: Sure. With regard to the
13 cost-shifting issue, to wrap it up, you know,
14 it's fairly easy to request something if you
15 don't think that it's going to cost you anything.
16 And that's what the plaintiffs have done.
17 They've basically said they want us to bear all
18 costs that are connected with this.

19 Frankly, I think, if the plaintiffs had
20 to the bear the costs in connection with
21 reviewing a bunch of privileged documents that
22 are almost to certain to not really yield
23 anything, I think that they'd reconsider it.

24 And so that's really what we want, Your
25 Honor, is we think it should be the plaintiffs

1 that actually have to bear some costs associated
2 with trying to go through e-mails from, you know,
3 November 2020 onward when Mr. Randazzo had
4 counsel, and the communications are almost
5 certainly going to be privileged.

6 MR. JUDGE: So what's your opinion of a
7 fair percentage that they would need to bear?

8 MR. CORCORAN: A fair percentage?

9 MR. JUDGE: Yes.

10 MR. CORCORAN: Well, Your Honor, we've
11 asked for all of it.

12 I think we proposed a compromise at one
13 point of 50/50, but I don't have -- I need to go
14 up and look exactly what the time period was.

15 I think our compromise that they
16 rejected before moving to compel was we would do,
17 I think, through April 2021. So we would search
18 what we have. We would try to find appropriate
19 exclusions so that way we would keep out, you
20 know, Mr. Sugarman's name, for example --
21 would eliminated hits for that. And I think our
22 proposal was to split it 50/50. And, again,
23 Roger can correct me if I'm wrong on that. But
24 that was -- I thought that was a pretty
25 reasonable proposal.

1 MR. JUDGE: Give me one moment. I want
2 to look in my notes here. Okay. Thank you.

3 Go ahead.

4 MR. CORCORAN: Your Honor, I don't have
5 anything further right now unless there are any
6 questions you have.

7 MR. JUDGE: I do not. Thank you very
8 much, both counsel.

9 Rebuttal briefly.

10 MS. COCALIS: Can you hear me now?

11 MR. JUDGE: Yes.

12 MS. COCALIS: So I just want to respond
13 to a few points.

14 So, first, you asked how the court's
15 order was unambiguous. You note that they did
16 not provide any answer to that question, because
17 they can't, because the court's order was in
18 response to Plaintiffs' subpoena which sought
19 documents through December 31st, 2021. She did
20 not limit in any way. She did not mention
21 cost-shifting.

22 And, again, they didn't provide any
23 reason for how these objection are timely. They
24 were waived in 2022 and then again when
25 Plaintiffs moved to compel in April of 2023.

1 Next, they talk about the complex search
2 terms that Plaintiffs had them run. We just
3 asked them to simply run the term "FirstEnergy."
4 The fact that they submitted declarations
5 attesting that they conducted a reasonable search
6 for any document regarding the 4.3 million and
7 didn't even include the term "FirstEnergy" or any
8 version of 4.3 million speaks volumes.

9 And I'd like to address their post
10 production. That production has nothing to do --
11 it doesn't resolve these issues in any way. It
12 was simply the result of Plaintiffs' own efforts,
13 for example, identifying additional phones that
14 were not disclosed as part of their search
15 methodology.

16 Separately, they talked about how all
17 the documents are going to be exclusively
18 privileged.

19 First, when you make arguments regarding
20 undue burden, it is your burden to explain how
21 that's true. They have submitted no declaration
22 saying that they are exclusively privileged.
23 They didn't say, Hey, I ran a sample of
24 documents, and ten out of ten came back
25 privileged. Nothing. Rather, they produced a

1 privilege log where less than 8 percent of the
2 documents that they have produced in this
3 litigation they were claiming are privileged.

4 So from Plaintiffs' perspective, there's
5 no reason to believe that all of these documents
6 are going to be privileged.

7 Further, that privilege log covers
8 documents from November 2020 and from the time
9 where Mr. Sugarman had already been hired.

10 So, again, there's no basis for them to
11 claim that all of these are exclusively
12 privileged. That's simply their conjecture.

13 Further, they have not explained how
14 this time period, when Mr. Randazzo was not
15 acting as an attorney -- he had resigned as an
16 attorney from a firm years ago to pursue nonlegal
17 work about a payment that was not made -- that
18 was not about a legal payment -- would be
19 privileged.

20 Again, they talk about how we already
21 know where all the 4.3 went, and so they don't
22 need to produce them.

23 They made this argument to Judge Jolson
24 in their May 15th submission to the court. And
25 her response to them was, Your position is

1 inconsistent with my prior order; you need to
2 produce any document regarding the 4.3 million
3 within your possession, custody, or control.

4 Turning to the relevant factors
5 regarding cost-shifting, they overwhelmingly
6 weigh against cost-shifting under these facts and
7 circumstances.

8 Judge Jolson's March 24, 2023 order is
9 on point. There, Judge Jolson held that, where
10 nonparties' search protocol was sufficient in
11 identifying documents responsive to Plaintiffs'
12 subpoena and the court's prior order, they had to
13 conduct additional searches at their own expense
14 because the first and third factors weighed
15 against cost-shifting.

16 First, here, there's no doubt that
17 Mr. Randazzo is an interested party. FirstEnergy
18 has admitted to paying him \$22 million from 2010
19 to 2019, 4.3 of which was a bribe to get him to
20 do whatever they said.

21 As Mr. Randazzo's own authority, the
22 2023 American Municipal Power v. Voith case,
23 holds, what makes their party interested is their
24 involvement in underlying conduct that led to
25 this litigation. This litigation is about

1 Mr. Randazzo's conduct.

2 And, further, Mr. Judge could simply end
3 his inquiry here, as Mr. Randazzo's authority,
4 again, notes that many courts refuse to shift
5 costs based on this factor alone. In fact, in
6 that case, the court held where this was the only
7 factor that weighed against cost-shifting. The
8 nonparty had to bear up to \$500,000 in expenses.
9 It's says a lot that one of the best cases he
10 could find would demand that Plaintiffs' motion
11 be granted.

12 Secondly, with regard to the second
13 factor, Judge Jolson has held that where both
14 parties are well-resourced, that there does not
15 appear to be -- it would not be particularly
16 onerous for the nonparty to bear the expenses,
17 this factor is neutral.

18 As was evident by their remarks, there's
19 no reason to believe that this factor and that
20 Mr. Randazzo cannot be pay the, at most, 20- to
21 \$30,000 in expenses here.

22 He has not submitted any declarations.
23 He has millions of dollars in his bank account.
24 FirstEnergy has admitted to paying him
25 \$22 million. He sold a house recently in 2021

1 for \$3.9 million. He had enough money to give
2 away one of his homes to his child for free.

3 And since demanding that the plaintiffs
4 bear his costs for complying with two orders, he
5 has brought on two additional law firms to
6 represent him in this case and to fight
7 Plaintiffs.

8 Now, what Judge Jolson -- particularly
9 persuasive in her March order was that the
10 nonparties could expend resources litigating
11 compliance with Plaintiffs' subpoena.

12 As you can see from this long, sordid
13 history, Mr. Randazzo could clearly expend
14 resources fighting Plaintiffs.

15 Further, Mr. Randazzo's Voith authority,
16 again, cites cases showing that, far from being
17 relatively neutral, this factor weighs in
18 Plaintiff's favor.

19 For example, it cites the
20 United States v. Cardinal Growth case. And in
21 that case, the court found that, where the
22 expenses were \$44,000 approximately, the nonparty
23 had earned 2 million in fees. This factor
24 weighed against cost-shifting.

25 Here, we have 11 times that. He has

1 earned \$22 million from FirstEnergy. And his
2 fees are purportedly 20- to \$30,000, including
3 attorneys' costs.

4 Third, Judge Jolson has already held
5 that this litigation is of public importance, as
6 it involves one of the largest public corruption
7 schemes in U.S. history. And, thus, a nonparty
8 has a particular obligation to -- Plaintiffs to
9 produce all the documents within their
10 possession, custody, or control, absent
11 cost-shifting.

12 The public importance of this case has
13 been echoed by Chief Judge Marbley, Judge Black,
14 and Judge Adams.

15 I did not hear Mr. Randazzo give any
16 reason as to why this court should disregard the
17 law of this case or the multiple district judges'
18 finding the public importance of this case.

19 Further, Mr. Randazzo and SFAO have
20 failed to establish their burden to show that the
21 expenses are significant.

22 As held in the 2021 American Municipal
23 Power v. Voith case and the State Farm v. Elite
24 case and the B.L. v. Schuhmann case, nonparties
25 must support their allegations of undue burden

1 with detailed time and cost allegations supported
2 by knowledgeable declarations.

3 The declarations submitted here are not
4 knowledgeable. They admit they don't have any
5 idea about the volume of documents. Their vendor
6 cannot provide you a complete, accurate estimate
7 of the cost, because he -- or they -- excuse
8 me -- do not know the volume of documents that
9 need to be reviewed.

10 These are precisely the type of
11 affidavits from vendors and from lawyers that the
12 Voith court found insufficient for the nonparty
13 to meet its burden.

14 And, finally, I'd like to just address
15 their argument regarding the 2019 -- Plaintiffs'
16 specific -- so he says there's no reason to
17 believe that there's a problem with the 2019
18 e-mails. There is only 10 percent of 2019
19 e-mails collected as compared to the prior four
20 years and 2.5 percent as compared to 2020.

21 Even Mr. Sugarman, when we saw these
22 numbers, admitted, huh, this is strange. Why is
23 it so much lower?

24 Plaintiffs simply asked counsel to log
25 in to the cloud-based accounts and just check.

1 Are they synced? Are they not synced? We're not
2 going to ask you to spend money unless, if you go
3 there and say, huh, they're not on the cloud
4 either.

5 That would take five us minutes. But
6 didn't do that. Instead, they came back to
7 counsel and said their vendor recommended that
8 they collect the documents from the cloud.

9 And so Plaintiffs are simply asking for
10 what they were entitled to in the April 5th
11 order. And they have not provided any reason to
12 argue that these are timely objections or that
13 they don't fall under the April 5th order.

14 That's all I have, Your Honor.

15 MR. JUDGE: Thank you, Counsel.

16 I appreciate the arguments from all
17 counsel involved.

18 Again, I will take the matter under
19 advisement and issue a decision in due course.

20 Counsel for Plaintiffs, I ask that you
21 resubmit to me by e-mail a Word version copy of
22 your proposed order that is already filed on the
23 docket as a PDF. Please copy opposing counsel on
24 that e-mail to me in which you submit that to me.

25 MR. CORCORAN: Mr. Judge, may I make a

1 quick clarification of an issue that came up that
2 she just said?

3 She said that Mr. Randazzo has millions
4 of dollars in his bank account. I'm not sure
5 what she's referencing there. To the extent that
6 she's referring to the money that was in
7 Mr. Sugarman's account, it's frozen. To the
8 extent she's referring to money that went to
9 Loeb & Loeb, it's not his money.

10 So it's just wrong to say that he
11 received -- that he had millions of dollars just
12 sitting around and he can just cut a check for
13 this. And I've already addressed the \$22-million
14 issue. But the idea that he's just sitting
15 around and has all this money in this bank
16 account, that he should just have to pay it,
17 that's not correct. I'm not sure what she's
18 relying on for that.

19 MR. JUDGE: I'm not crediting that
20 figure.

21 Frankly, from the evidence submitted by
22 both sides, I have no idea how much
23 Mr. Randazzo -- money he has or does not have.
24 That hurts you. That hurts him, the fact that I
25 don't know that.

1 And, you know, I don't think it's a
2 surprise, you know, today's decision. I'm going
3 to take it under advisement. I'll issue a
4 decision.

5 Where I'm leading right now -- I need to
6 do a little bit of research -- is not in his
7 favor, in part, because of the dearth of
8 information in front of me.

9 Today was the day to submit that
10 information. There's been ample briefing and
11 opportunity for oral argument. And I'm not going
12 to extend the period to learn that information if
13 he didn't care to present it to me now.

14 So at this juncture, I'm ready to rule
15 against him. I'm going to get the proposed
16 order. I'm going to change quite a bit of it and
17 add to it and hopefully get a decision out in due
18 course.

19 Do we have any other matters related to
20 motions argued today that we need to discuss?

21 Victoria, if we could go off the record,
22 please.

23 - - - -

24 (Proceedings concluded at 1:10 p.m.)

25 - - - -

C E R T I F I C A T E

The State of Ohio,) SS:
County of Cuyahoga.)

I, Victoria S. Fricano, a Notary Public within and for the State of Ohio, duly commissioned and qualified, do hereby certify that the proceedings given was by me reduced to stenotypy, afterwards transcribed, and that the foregoing is a true and correct transcription of the proceedings given.

I do further certify that this proceeding was taken remotely at the time and place in the foregoing caption specified and was completed without adjournment. I do further certify that I am not a relative, employee, counsel or attorney for either of the parties, or otherwise interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Cleveland, Ohio, on this 20th day of October, 2023.



Victoria S. Fricano, RPR
Notary Public, State of Ohio
My commission expires June 16, 2027 wear off

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